Nos. 21982 and 21982A

United States Court of Appeals

FOR THE NINTH CIRCUIT

T. STANFORD GOODMAN d/b/a
LINDO ENGINEERING, et al.,

Appellant,

vs.

UNITED STATES OF AMERICA
ex rel JOHN P. RINEER, d/b/a
RINEER OIL SURFACING,

Appellee.

T. STANFORD GOODMAN d/b/a
LINDO ENGINEERING, et al.,

Appellant,

vs.

UNITED STATES OF AMERICA ex rel
TURLOCK ROCK COMPANY,

Appellee.

Appeal From the United States District Court
For the Eastern District of California

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

TO THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

STATEMENT OF THE CASE

Civil Action No. 21982 is an appeal from an action in the United States District Court for the Eastern District of California in which JOHN P. RINEER

(hereinafter referred to as "RINEER" for the sake of brevity and convenience) brought an action on a bond executed under the Miller Act (Title 40, Section 270 (a), (b), (c), (d) and (e) for materials and labor supplied by Rineer under a written contract agreement with T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING (hereinafter referred to as "GOODMAN" for the sake of brevity and convenience). Said written contract is a Subcontract Agreement dated July 16, 1965. GOODMAN had a prime contract with the United States Air Force at the Castle Air Force Base near Turlock, California. The Miller Act Bond was executed by appellant HARTFORD ACCIDENT AND INDEMNITY COMPANY (hereinafter referred to as "HARTFORD" for the sake of brevity and convenience.)

Civil Action No. 21982-A is an appeal from an action also under the Miller Act brought by the TURLOCK ROCK COMPANY (hereinafter referred to as "TURLOCK" for the sake of brevity and convenience) against GOODMAN and HARTFORD for materials furnished by TURLOCK to RINEER and GOODMAN under an oral agreement also for use at the Castle Air Force Base.

The RINEER case and the TURLOCK case were consolidated for trial by stipulation. The cases came on for trial, the court sitting without a jury, in the United States District Court for the Eastern District of California, on January 11 and 12, 1967.

Judgment was entered against the appellant and in favor of both appellees on May 8, 1967, and May 23, 1967, and this appeal followed in due course.

FACTS

On April 22, 1965, GOODMAN, as a prime contractor, entered into a written contract with the United States, whereby GOODMAN was to effect the repair of a shoulder, ground work and certain other work at the Castle Air Force Base in California. Under this prime contract, HARTFORD executed a surety bond in proper amount to insure payment of labor and materials pursuant to the MILLER Act requirements.

On May 24, 1965, a proposal to sub-contract was made by RINEER to GOODMAN in which RINEER stated he was an experienced contractor in the type of work needed under the contract. (Deft. Exhibit "E", Rep. Tr., pp. 112, 113).

On July 16, a formal written subcontract was entered into between RINEER and GOODMAN (Plf. Exhibit 4 & 5, Rep. Tr., p. 76) a section of this subcontract and which is most pertinent to the issues raised in this appeal reads as follows:

> "Sand to be supplied by Turlock Rock Company at the plant at $1.30 per ton, plus sales tax according to specificiations. Any reduction in the sand price, will reduce RINEER'S oil contract by an equal amount."

A representative of the United States had gone to the TURLOCK ROCK COMPANY before the subcontract between RINEER and GOODMAN had been executed; and this representative had approved a certain type of sand to be used on the contract job. This type of sand is called "concrete" sand. TURLOCK had plenty of concrete sand on hand; it was dry and would have caused no trouble on the job for RINEER. (Rep. Tr., pp. 133, 137, 294).

Before RINEER started his work under the subcontract, he visited the TURLOCK ROCK COMPANY'S yard for the purpose of inspecting the materials he was to use. RINEER decided that the government-approved "concrete" sand would not do since, in his opinion, the concrete sand would not meet the specifications on the job. RINEER arbitrarily changed the type of sand from "concrete" sand to "plaster" sand. (Rep. Tr., p. 133).

RINEER made this decision knowing that TURLOCK would have trouble making the plaster sand in the quantities needed and with a moisture problem. (Rep. Tr., pp. 83, 133, 134).

RINEER personally ordered the plaster sand from TURLOCK and started work on July 19, 1965. (Rep. Tr., p. 101).

RINEER immediately had difficulty in applying the sand he received from TURLOCK because of the wetness of the sand. (Rep. Tr., pp. 80, 81).

RINEER complained to TURLOCK about the wetness of the sand on the first day of delivery, and TURLOCK sent out some equipment to aerate it. RINEER continued to have troubles on the job. (Rep. Tr., p. 84).

The Government complained to GOODMAN in writing on July 30, 1965, concerning the competency of RINEER; (Deft. Exhibit "A", Rep. Tr., pp. 22, 24). and on August 4, 1965, issued a "stop order" to GOODMAN which stopped the work under the prime contract because RINEER was not furnishing the work product which the Government expected. (Deft. Exhibit "B", Rep. Tr., pp. 26, 27).

On August 3, 1965, RINEER quit the job (at which time there were approximately 20% of RINEER'S job completed); giving as an excuse that there was too

much moisture in the sand to work.

On August 26, 1965, the Government ordered GOODMAN in writing to resume the work under the contract. (Deft. Exhibit "C", Rep. Tr., p. 28).

On August 30, 1965, GOODMAN orally ordered RINEER to return to the job site and complete the job. RINEER refused to do so since the same type of sand was available as RINEER had used before unsuccessfully. On September 17, 1965, GOODMAN gave a written 48 hour notice ordering RINEER to get back on the job and complete the contract. (Deft. Exhibit "F", Rep. Tr., p. 117).

RINEER answered the 48 hour notice by refusing to return to work unless the sand was changed and only if GOODMAN paid RINEER certain "damages". (Deft. Exhibit "G", Rep. Tr., pp. 118, 119).

On September 20, 1965, GOODMAN wrote RINEER a letter in which GOODMAN explained that the sand was not unusable, but merely more difficult to use because of the moisture in the sand. (Deft. Exhibit "H", Rep. Tr., pp. 120, 121).

On September 28, 1965, GOODMAN wrote RINEER a letter telling RINEER that GOODMAN was going to complete RINEER'S work unless RINEER did it himself. (Deft. Exhibit "I", Rep. Tr., p. 122).

GOODMAN did in fact complete RINEER'S work under the contract, finishing the work before November 19, 1965. GOODMAN used the same type of sand and used the same type of equipment in completing RINEER'S work under the subcontract as RINEER was using when he quit work. The Government accepted the work of GOODMAN, stating the work met specifications although the job took somewhat longer than the Government had anticipated. (Rep. Tr., pp. 55, 63).

The only specification for the sand to be used on the contract is found in Plaintiff's Exhibit 2. The pertinent part thereof as it relates to moisture reads as follows:

> "The aggregate shall be sufficiently free of moisture to enable it to be readily coated with bituminous material. Drying of the aggregate may be required, as directed." (Plf. Exhibit No. 2, Rep. Tr., p. 237).

It is to be noted that nothing in these sand specifications refer to either "concrete" or "plaster" sand. RINEER did not attempt to dry the sand aggregate in order to make it more usable.

TURLOCK'S representative testified that he quoted $1.30 per ton to GOODMAN assuming concrete sand was what was desired for the job since TURLOCK uses concrete sand for seal coat on other similar jobs. (Rep. Tr., p. 294).

The price of "plaster" sand (which is a "finer" sand than concrete sand) is $1.50 per ton. (Rep. Tr., p. 294).

This $1.50 price was first quoted to GOODMAN'S representative after RINEER had changed the order from concrete sand to plaster sand. (Rep. Tr., p. 295.)

QUESTIONS ON APPEAL

I PLAINTIFF RINEER'S COMPLAINT DOES NOT STATE A VALID AND LEGAL CAUSE OF ACTION UNDER THE MILLER ACT AGAINST APPELLANTS.

II UNDER THE WRITTEN SUBCONTRACT BETWEEN RINEER AND

GOODMAN, RINEER WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF THE SAND ON THE PROJECT. THE COURT ERRED IN NOT MAKING A FINDING OF FACT ON THIS ISSUE.

III EVEN IF GOODMAN WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF SAND ON THE PROJECT, RINEER ASSUMED THIS RESPONSIBILITY BY CHANGING THE TYPE OF SAND ORDERED.

IV SINCE THE GOVERNMENT ACCEPTED THE JOB AS COMPLETED BY GOODMAN (WITH THE SAME TYPE OF SAND AND EQUIPMENT WHICH RINEER COULD NOT USE SUCCESSFULLY) IT MUST BE CONCLUDED THAT RINEER WAS INCOMPETENT AND INEXPERIENCED IN HIS DUTIES.

V THE TRIAL COURT ERRED IN FINDING THAT GOODMAN GUARANTEED THAT THE SAND WOULD BE ACCORDING TO SPECIFICATIONS.

VI TURLOCK SHOULD BE RESPONSIBLE FOR THE EXTRA EXPENSE GOODMAN INCURRED TO SATISFACTORILY COMPLETE THE PROJECT.

ARGUMENT

I PLAINTIFF RINEER'S COMPLAINT DOES NOT STATE A VALID AND LEGAL CAUSE OF ACTION UNDER THE MILLER ACT AGAINST APPELLANTS.

1. Whether the Complaint of RINEER states a valid cause of action against appellants is in issue and a matter properly before both the trial court and this appellate court.

Issue of fact No. 14 of the stipulated pre-trial order.

2. The issue of whether a suit under the Miller Act for Labor and Materials

is identical to a suit for breach of contract is also properly before the trial court and the appellate court.

Issue of fact No. 3 of the stipulated pre-trial order.

3. RINEER apparently is pleading a "common-count" in his Complaint, since he alleges in paragraph X thereof that certain labor and materials were furnished. It is true that reference to the subcontract between RINEER and GOODMAN is made in the Complaint but nowhere in the Complaint is any allegation as to a breach of the contract by GOODMAN. Nor, is there any allegation of compliance by RINEER of the conditions and covenants on his part required to be performed under the contract.

Paragraph X of RINEER'S Complaint.

4. The applicable law on this question is that suit cannot be brought under the Miller Act on a common count where there is a written contract between the parties unless there is alleged and proven a material breach of that contract.

Jefferson Construction Co. -vs- U. S. ex rel Bacon: 1st circuit (1960) 283 F.2d 265. Cert. denied (1961) 365 U.S. 835.

Southern Painting -vs- U. S. ex rel Silver: 10th circuit (1955) 222 F.2d 431.

5. Since RINEER has not alleged and proven a material breach of the contract between RINEER and GOODMAN, his Complaint does not state a valid and legal cause of action against GOODMAN. Also, since RINEER has not alleged and proven his compliance with the covenants and conditions of the contract, the complaint does not state a valid cause of action for this additional reason. In any event,

the Miller Act does not substitute a cause of action on a common count in derrogation of the provisions of an expressed subcontract.

Jefferson Construction Co. -vs- U. S. ex rel Bacon id.

Southern Painting -vs- U. S. ex rel Silver id.

1 Witkin Summary 294:

Calif. Civil Code 1439:

De la Falaise -vs- Gaumont Pictures (1940) 103 P. 2d 447,

39 Cal. App. 2d 461:

Lewis Publishing Co. -vs- Henderson (1930) 284 P. 713,

103 Cal. App. 425.

II UNDER THE WRITTEN SUBCONTRACT BETWEEN RINEER AND GOODMAN, RINEER WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF THE SAND ON THE PROJECT: THE COURT ERRED IN NOT MAKING A FINDING OF FACT ON THIS ISSUE.

1. There is no doubt that the water in the sand obtained from TURLOCK caused the difficulty encountered on the job by RINEER. Who is responsible for the selection and furnishing of the sand on the project is one of the basic issues in this case.

Issue of fact No. 6, Stipulated pre-trial order.

Rep. Tr., p. 159, ll. 9 - 11.

Rep. Tr., p. 176, ll. 1 - 3.

2. Since this issue is so important, and because it is one of the ultimate issues of fact to be decided as specified in the stipulated pretrial order, it should have been decided by the trial court. Nowhere in the Findings of Fact is there

any statement by the trial court to answer this issue. Appellants respectfully suggest that this omission by the trial court is error which must itself lead to a reversal in this case. As stated in JAMES -vs- HALEY, 212 Cal. 142, 297 P. 920, and MASON -vs- ENNES, 172 Cal. App. 2d 99; 342 P. 2d 79, the rule of law is that findings are required on all material issues raised by the pleadings and evidence, unless waived, and if the court renders judgment without making findings on all material issues, the case must be reversed.

3. In considering this issue on the factual merits, the subcontract between RINEER and GOODMAN (Plf. Exhibit 4 and 5) should be first examined, and from that document these points observed.

(a) "Sub-contractor (Rineer) certifies and agrees that he is fully familiar with all of the terms, conditions and obligations of the Contract Documents, as hereinafter defined, the locations of the job site, and the conditions under which the work is to be performed, and that he enters into this sub-contract based upon his own investigation of all of such matters and is in no way relying upon any opinions or representations of the Contractor". (Goodman) (Sub-contract Page 1 of Plf. Exhibit 4 & 5.)

(b) "Sub-contractor (Rineer) agrees to furnish all labor, materials, installation, cartage, supplies, equipment, scaffolding, tools, and other facilities of every kind and description required for the prompt and efficient execution of the work described herein, and to perform the work necessary to complete

sealing and sanding for the said project in strict accordance with the Contract Documents as described herein, and as more particularly, though not exclusively, specified in Section 6 of the specifications for the above-mentioned Contract Number AF 04 (604) - 2546." (Plf. Exhibit 1 - the Government Contract.)

Sec. I - "Scope" of Sub-contract

Plf. Exhibit 4 & 5

Plf. Exhibit 2

(c) "In the event the scope of the work includes installation of materials or equipment furnished by others, it shall be the responsibility of the sub-contractor (Rineer) to examine the items so provided and thereupon handle, store and install the items with such skill and care as to insure a satisfactory installation. Loss or damage done due to acts of the sub-contractor shall be charged to the account of the sub-contractor and deducted from the monies due under this agreement."

Sec. U - Materials furnished by others

"General Conditions" of Sub-contract

Plf. Exhibit 4 & 5.

(d) "The sub-contractor (Rineer) guarantees all materials and workmanship and agrees to replace at his sole cost and expense and to the satisfaction of the sub-contractor (Goodman), any or

all materials adjudged defective or improperly installed as well as guarantee the owner (Government) and contractor (Goodman) against liability, loss or damage arising from said installation during a period of one year from completion and acceptance of the entire project."

Sec. S - Guarantee:

"General Conditions" of Sub-contract

Plf. Exhibit 4 & 5.

(e) Under the Special Provisions clause of the sub-contract, the following language is found:

"Sand to be supplied by Turlock Rock Company, at the plant, at $1.30 per ton, plus sales tax, according to the specifications. Any reduction in the sand price, will reduce Rineer's Oil contract by an equal amount."

4. The testimony in this case reflects that RINEER had been quoted a price of $1.50 per ton for the sand, whereas, GOODMAN had been quoted a price of $1.30 per ton. (Rep. Tr., pp. 78, 147, 152, 178, 182). The confusion undoubtedly stemmed from the fact that TURLOCK quoted its price of $1.50 per ton for plaster sand to RINEER and $1.30 per ton for concrete sand to GOODMAN.

This confusion led to the stipulation in the sub-contract - special provision (e) (supra) which provided for the $1.30 per ton price. This substantiates GOODMAN'S testimony that RINEER had insisted upon this provision in the contract, rather than GOODMAN. (Rep. Tr., p. 198, l. 21).

This also substantiates GOODMAN'S testimony as to the paragraph in the special provision dealing with any possible reduction in the sand price of $1.30 since the $1.30 price was considered to be a top price for the sand desired and selected by the government. (Rep. Tr., pp. 258, 259).

Also, the testimony is to the effect, fairly construed, that the only reason that TURLOCK ROCK was expressly stated as the source of the aggregate for the job was because it was the approved source of the government and because RINEER wanted a guarantee as to the maximum price. Otherwise, TURLOCK would be considered in the same category as the DOUGLAS OIL COMPANY (another Government approved source but where there was no problem as to price for the oil).

5. In summary, it must be concluded that RINEER was responsible for the selection and furnishing of the sand on the project because of the express wording of the subcontract; in that RINEER agreed to furnish all labor and materials for the work, and that it was RINEER'S responsibility to examine the items so provided, and RINEER guaranteed all materials and workmanship. The testimony as to the confusion over different price quotations by TURLOCK also substantiates RINEER'S responsibility since the price finally claimed by TURLOCK was the price quoted to RINEER.

III EVEN IF GOODMAN WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF SAND ON THE PROJECT, RINEER ASSUMED THIS RESPONSIBILITY BY CHANGING THE TYPE OF SAND ORDERED.

1. Despite the apparent confusion caused by the $1.50 per ton quotation for one type of sand to GOODMAN, and $1.30 per ton quotation to RINEER, the crucial point involved in the testimony, however, is that Lt. Swan (the representative for the Government) had selected and approved concrete sand (the $1.30 type sand). (Rep. Tr., pp. 124, 133, 137, 243 and 294).

2. RINEER arbitrarily rejected the approved type of sand, and taking it upon himself, decided to substitute therefor the plaster sand ($1.50) which he thought would be better for the job he was to do. This despite the fact that Lt. Swan had previously approved the concrete sand; and despite the fact that TURLOCK had plenty of concrete sand on hand, that this sand was dry, and would have caused no trouble on the job for RINEER. (Rep. Tr., pp. 124, 133, 137 and 294.)

3. Also, RINEER made this decision to change the type of sand knowing that TURLOCK would have trouble making the plaster sand. (Rep. Tr., p. 133, ll. 24 and 25).

4. It must be noted quite strongly that RINEER made this decision changing the type of sand at least one month before he signed the contract with GOODMAN. (Rep. Tr., p. 83, ll. 3-15).

5. Therefore, it must be concluded that even if GOODMAN could be said to be responsible for the selection and furnishing of the sand, RINEER assumed this obligation by changing the type of sand ordered. He did this in the face of refusing the type of sand the Government itself had selected. So, RINEER must be held

responsible for the difficulty which he encountered with the sand received from TURLOCK.

IV SINCE THE GOVERNMENT ACCEPTED THE JOB AS COMPLETED BY GOODMAN, (WITH THE SAME TYPE OF SAND AND EQUIPMENT WHICH RINEER COULD NOT USE SUCCESSFULLY) IT MUST BE CONCLUDED THAT RINEER WAS INCOMPETENT AND INEXPERIENCED IN HIS DUTIES.

1. Defendant's exhibit "A" is a letter dated July 30, 1965, from Mr. William R. Mann, the Air Force contracting officer on the project. In this letter, he states,

> "I have doubts concerning the competency of your sub-contractor RINEER. However, he was selected by your firm and his ability or inability to perform does not appear to be grounds in itself to alter the approved progress schedule.

2. Also at page 24 of the Reporter's Transcript at line 9-11, Mr. Mann testified:

> "Q: You knew that there was trouble in the performance of Mr. Rineer's job; did you not?"
>
> "A: Yes."

3. The Government issued a stop order on the project because of the work of RINEER. (Deft. Exhibit "B", Rep. Tr., pp. 26, 27).

4. RINEER was put on notice as to the possible necessity of drying the sand by the specifications. (Plf. Exhibit 2 - Specifications). And yet, he did nothing in the attempt to dry the sand and complete the job. He failed completely in his duties under the sub-contract.

5. When RINEER arbitrarily refused to return to work after due and proper notice by GOODMAN, the job was completed on GOODMAN'S forces using the same type of sand RINEER had ordered, and with the same type of equipment as RINEER had used. The job just took a little longer and took more imagination in the execution on the job. The Government accepted the job as completed by GOODMAN so that it had to be completed according to specifications. (Rep. Tr., pp. 55, 69 and 70).

6. It is only logical therefore to conclude that the trouble in this project was due entirely to the inexperience and inability of RINEER, not of any actions of GOODMAN. In other words, RINEER failed to comply with the conditions and covenants of his sub-contract required to be performed on his part.

7. It is of course, the law that RINEER had to be free from substantial default himself in order to avail himself of the remedies for GOODMAN'S alleged breach of the contract. Hence, RINEER had to plead and perform performances or tender of performance on his part or an excuse for performance. Or, stating the rule another way, before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself. RINEER did not allege or prove this obligation.

1 Witkin Summary 294:

Calif. Civil Code 1439:

De la Falaise -vs- Gaumont Pictures (1940) 103

P. 2d 447, 39 Cal. App. 2d 461:

Lewis Publishing Co. -vs- Henderson (1930)

284 P. 713, 103 Cal. App. 425.

V THE TRIAL COURT ERRED IN FINDING THAT GOODMAN GUARANTEED THAT THE SAND WOULD BE ACCORDING TO SPECIFICATIONS

1. Paragraph XII of the Findings of Fact by the trial court states that GOODMAN guaranteed that the sand obtained from TURLOCK would be according to specifications The court also found as a fact that the sand did not meet specifications as to moisture content. (Paragraph XII - Findings of Fact, lines 13 and 14, page 103 of Transcript of Record).

2. Appellants respectfully suggest that this finding by the trial court is not supported by the evidence. In fact, the evidence clearly reflects the contrary.

(a) Under the terms of the sub-contract, RINEER was responsible for the selection and furnishing of the sand. (See argument supra).

(b) RINEER also expressly guaranteed all materials and workmanship under the sub-contract

Sec. "S" of "General Conditions"

Plf. Exhibit 4 and 5

(c) The Special Provisions of the contract do refer to the specifications of the sand, it is true. The pertinent part is again stated:

"Sand to be supplied by TURLOCK Rock Company, at the plant at $1.30 per ton, plus sales tax, according to the specifications"

But this does not necessarily mean that GOODMAN was guaranteeing that the sand was to be according to specifications. To hold this would be to completely derogate Sec. "S" of the

general conditions in which RINEER guaranteed the sand.

3. It must be remembered also that RINEER changed the type of sand the government had originally selected. How can GOODMAN therefore be held to guarantee the sand used when RINEER arbitrarily and voluntarily chose to take this action?

4. Even if the court was correct in holding that GOODMAN guaranteed that the sand would be according to specifications, there is no evidence that the sand was not according to specifications.

(a) The only specification for the sand appears in plaintiff's exhibit No. 2 as follows:

"The aggregate shall be sufficiently free of moisture to enable it to be readily coated with bituminous material. Drying of the aggregate may be required, as directed."

(b) There is of course, no "percentage of moisture" content or other standard to apply here, and we have to look to what the government did to see if the sand met the specifications or not. Mr. Bruce of the government testified as follows on this subject:

"Q: But the job was finally accepted, though; was it not?"

"A: Yes, Sir, it was finally accepted, that it met the specifications although it took somewhat longer than we had anticipated."

"Q: Speaking of specifications, the specifications as far as the sand was concerned, were completely complied with, with the

exception of the spreading difficulty; is that correct?"

"A: Yes, Sir."

Rep. Tr., p. 55, lines 2 - 11 inclusive.

VI TURLOCK SHOULD BE RESPONSIBLE FOR THE EXTRA EXPENSE GOODMAN INCURRED TO SATISFACTORILY COMPLETE THE PROJECT.

1. TURLOCK originally initiated the problems here by quoting a price of $1.50 per ton to RINEER and $1.30 per ton to GOODMAN. When Lt. Swan selected the $1.30 per ton type of sand, and then RINEER rejected this type and selected the $1.50 per ton type, it would appear that TURLOCK was under a duty to at least inform GOODMAN of this change. This becomes obvious when we hear that TURLOCK looked only to GOODMAN for the payment of the obligation.

2. Since TURLOCK had plenty of the $1.30 dry sand on hand to complete the job, and TURLOCK went along with the change to the $1.50 wet sand by RINEER, it then follows that the additional cost incurred by GOODMAN in using the wet sand after RINEER left the job should be assessed against TURLOCK. The trial court erred in not granting judgment for appellants against TURLOCK.

CONCLUSION

Based upon the above, it is respectfully submitted that the trial court erred in giving judgment for the Appellees-Plaintiffs in this action. The facts elicited by the testimony and the documentary evidence should have logically led the trier of fact and should lead this honorable court to reverse the judgments and to render judgment for the Appellants-Defendants.

Respectfully submitted,

MARSH AND GRAVES

By /s/ EDWARD E. MARSH, JR.

Attorneys for Defendants-Appellants

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARSH AND GRAVES

By /s/ EDWARD E. MARSH, JR.